

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

COCA-COLA BOTTLING CO., MID-
ATLANTIC
Respondent

Case No.: I-02-12046

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985, D.C. Official Code §§ 2-1801.01- 2-1802.05, and Title 20 Chapter 9 of the District of Columbia Municipal Regulations (“DCMR”). On July 2, 2002, the Government served a Notice of Infraction on Respondent Coca-Cola Bottling Co., Mid-Atlantic alleging a violation of 20 DCMR 900.1, which prohibits, with certain exceptions, motor vehicles from idling their engines for more than three minutes (the “Regulation”). The Notice alleged that the violation occurred on June 26, 2002, in the 1100 block of Okie Street, N.E., and sought a fine of \$500.

On July 10, 2002, Respondent filed a timely answer of Deny. At the scheduled hearing on August 13, 2002, Kimberly Katzenbarger, Counsel to the Air Quality Division, D.C. Department of Health, represented the Government. Mr. Neil Williams, the Government inspector who issued the Notice of Infraction (the “Inspector”), also appeared. Mr. Gil Collier, Division Safety Manager for Respondent, appeared on behalf of Respondent.

At the commencement of the hearing, Mr. Collier requested that Respondent's answer be changed from Deny to Admit with Explanation, and that I suspend or reduce the fine. Mr. Collier said that he believed the exception to the Regulation for the use of power takeoff equipment was applicable, and he represented that as a general rule Respondent's vehicles comply with the Regulation.

Respondent's answer was changed to Admit with Explanation, without objection. Also, a written statement by Glenn Sanders, the driver of Respondent's vehicle, Respondent's Exhibit ("RX") 203, and three photographs of the vehicle, RX 200-202, were admitted into evidence, without objection.

In the driver's statement he explained that at the time of the violation he was in the process of making a delivery of three pallets, which took approximately fifteen minutes. Mr. Collier testified that the delivery process entailed the driver leaving the vehicle parked in the street while he went to talk with the customer's receiving clerk to arrange for the for the actual delivery.

According to the driver, the battery powering the lift gate on the trailer was weak, so it was necessary to idle the tractor's engine to keep the battery charged to operate the lift gate. RX 203. The driver also pointed out that the Inspector did not give him the Notice of Violation at the time of the violation nor did the Inspector talk to him about the violation. *Ibid.*

Respondent's photographs show the back of the trailer and the lift gate with a power jack on it, RX 200, the lift gate partially lowered, RX 202, and the battery that is located between the tractor and the trailer, RX 201.

The Inspector testified that he observed Respondent's vehicle parked on the street and that he did not see a driver in or around the truck during the entire six minutes he clocked the engine idling. He also testified that the lift gate to the trailer was not being operated the entire time he observed the vehicle. Admitted into evidence was a photograph of the truck taken by the Inspector at the time of the violation that shows the empty tractor. Petitioner's Exhibit ("PX") 101. The Inspector said the photograph was taken while the vehicle was parked a few feet from the stop sign at the intersection at the end of the street, quite a distance from the nearest commercial building on the street. On the photograph the Inspector wrote the elapsed time as "2:30 to 2:09 PM", which he admitted was an error. He stated that the correct time of the infraction was "2:03 to 2:09 PM", as stated on the Notice of Infraction. PX 100.

Regarding Respondent's request for the suspension or reduction of the fine, the attorney for the Government said that the Government would not oppose a substantial reduction, to \$250, since this was a first offense by Respondent.

Based on the testimony of the witnesses, my evaluation of their credibility, the documents admitted into evidence and the entire record in the case I make the following findings of fact and conclusions of law.

II. Findings of Fact

By its plea of Admit with Explanation, Respondent has admitted violating the Regulation on June 26, 2002, by idling the engine on its vehicle for more than three minutes, as charged in the Notice of Infraction. Respondent's driver was in the process of making a delivery when the violation occurred, but I credit the Inspector's testimony that the driver was not using equipment powered by the truck's engine, such as the lift gate, when the violation occurred.

The Respondent has accepted responsibility for its unlawful conduct and there is no evidence in the record of a history of noncompliance with the Regulation by the Respondent. Also, the Government has recommended that the fine be reduced to \$250.

III. Conclusions of Law

Respondent violated the Regulation on June 26, 2002, by allowing the engine on its vehicle to idle more than three minutes while it was parked in the 100 block of Okie Street, N.E. The authorized fine for that violation is \$500 for a first offense. 16 DCMR §§ 3201.1(b)(1) and 3224.3(aaa).

There is an exception to the Regulation for the operation of power takeoff equipment. 20 DCMR 900.1(b) allows engines to idle for more than three minutes “[t]o operate power takeoff equipment including ... content delivery....” However, this exception is not applicable here. The driver stated that he was in the process of making a delivery that entailed the use of the lift gate on the trailer, which required the vehicle’s engine to be running to charge the battery powering it. Even assuming that this qualifies as power takeoff equipment for purposes of the Regulation, the evidence was that the lift gate was not in operation during the entire six minutes the Inspector clocked the parked vehicle with its engine idling. Only vehicles using power takeoff equipment are eligible for the exception; and there is no blanket exception to the Regulation simply for vehicles making deliveries. *DOH v. Best Trucking, Inc.*, OAH No. I-00-10056 at 3-4 (Final Order, July 28, 2000).

The fact that the Inspector did not attempt to contact the driver or Respondent before issuing the Notice of Infraction does not mitigate the violation in any way. While the Inspector has discretion to give a warning instead of issuing a Notice of Infraction, there is no legal

requirement that he do so. *DOH v. Bigbee Steele & Tank Company*, OAH No.I-00-11217 at 4 (Final Order, May 16, 2002).

These arguments do not warrant a suspension or reduction of the fine. However, because Respondent accepts responsibility for the violation, there is no evidence in the record of a history of noncompliance and the Government has recommended a substantial reduction of the fine, I will reduce the fine to \$250. *See* D.C. Official Code §§ 2-1802.02(a)(2) and 2-1801.03(b)(6); 18 U.S.C. § 3553; U.S.S.G. § 3E1.1.

IV. Order

Based upon the above findings of fact and conclusions of law, it is, this _____ day of _____, 2002:

ORDERED, that Respondent Coca Cola Bottling Co., Mid-Atlantic shall pay a total of **TWO HUNDRED FIFTY DOLLARS (\$250)** in accordance with the attached instructions within 20 calendar days of the date of service of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if the Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits, pursuant to D.C. Official Code § 2-

1802.03(f), the placement of a lien on real and personal property owned by Respondent, pursuant to D.C. Official Code § 2-1802.03(i), and the sealing of Respondent's business premises or work sites, pursuant to D.C. Official Code § 2-1801.03(b)(7).

FILED **08/19/02**

Robert E. Sharkey
Administrative Judge